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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

RIEN BAN,

Defendant and Appellant.

F075005

(Super. Ct. No. F14906061)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Fresno County. Jonathan B. Conklin, Judge.

Kyle Gee, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Daniel B. Bernstein and Jennifer M. Poe, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Levy, Acting P.J., Franson, J. and Snauffer, J.

After a jury trial, defendant Rien Ban was convicted of four counts of second degree murder arising out of a car crash he caused while driving under the influence of alcohol. He was sentenced to four consecutive terms of fifteen years to life in prison, for a total term of sixty years to life. On appeal, he contends sentencing error occurred because the trial court's reasons for imposing consecutive terms were either unsupported by the evidence or were wholly improper under the law. We conclude that even if some of the specific reasons Ban complains of were improper or unsupported by the evidence, there were other factors properly relied on by the court to justify the sentence. We therefore affirm.

BACKGROUND

The Crash

On June 22, 2014, Ban was driving a sport utility vehicle eastbound on Highway 180 in western Fresno County with two passengers—one in the front passenger seat and one in the back seat. At the same time, S.Q. was driving a four-door sedan westbound on Highway 180 with three passengers—her sister in the front passenger seat and her two children in the back seat. The portion of the highway where the crash occurred had only two lanes—one going east and one going west—and the speed limit in each direction was 55 miles per hour.

S.Q. was driving in the westbound lane at 57 miles per hour when she suddenly saw Ban's eastbound vehicle cross into her westbound lane as if to pass a car in the eastbound lane. S.Q. veered to the right to avoid colliding with Ban's car, but Ban turned in the same direction, so S.Q. tried to avoid being hit by turning to the left and hitting her brakes. The cars then collided. All three of S.Q.'s passengers were killed along with Ban's backseat passenger.

California Highway Patrol Officer Timothy Ray responded to the scene and spoke with Ban while he was on a gurney about to be airlifted to the hospital. Ban smelled of alcohol, and Officer Ray noted nystagmus in Ban's eyes. Officer Ray later met Ban at the hospital where Ban admitted drinking alcohol prior to driving that day. Ban also stated he was driving at about 70 miles per hour and then sped up to approximately

80 miles per hour to pass a vehicle. It was later determined Ban's blood alcohol concentration approximately two hours after the crash was about 0.21 percent.¹

On September 8, 2016, the Fresno County District Attorney's Office filed an amended information charging Ban with four counts of murder (Pen. Code, § 187, subd. (a)).² A jury found Ban guilty of second degree murder as to all four counts.

Ban's Prior Convictions for Driving Under the Influence

Ban had two prior convictions for driving under the influence of alcohol. His first conviction arose from a November 2000 car accident he caused while driving with a blood alcohol concentration of 0.26 percent, though he pled no contest with a stipulated blood alcohol concentration of 0.19 percent. He was arrested again in May 2006 for driving under the influence, but this time with a blood alcohol concentration of 0.35 percent. He pled guilty to this second driving under the influence offense and initialed the section of the plea form containing a court advisory on potential murder liability. The advisory read in part: "If you continue to drive while under the influence of alcohol or drugs, or both, and, as a result of that driving, someone is killed, you can be charged with murder."

Ban was also ordered to complete an alcohol program after each conviction, and in total he received over 100 hours of education, group sessions, and counseling from these programs.

¹ We note that the legal limit to drive is 0.08 percent. (Veh. Code, § 23152, subd. (b).)

² Undesignated statutory references are to the Penal Code.

The Sentencing Hearing

The probation officer's report listed no factors in aggravation relating to the crimes under California Rules of Court, rule 4.421,³ but as to factors in aggravation relating to the defendant, the report stated Ban's prior convictions were numerous or of increasing seriousness. The report listed no factors in mitigation under rule 4.423. The report noted "[t]he crimes involved separate acts of violence or threats of violence" as the sole criterion justifying consecutive sentences. The report also listed Ban's prior criminal convictions, which included his prior driving under the influence convictions. The report recommended the imposition of four consecutive indeterminate terms of 15 years to life, for a total of 60 years to life.

Defense counsel spoke on Ban's behalf at the sentencing hearing and described his horrific childhood. Ban was born in Cambodia and was four years old when the brutal Khmer Rouge regime took control of the country and forced his family into a labor camp where he lived until he was eight years old. The conditions in the labor camp were horrible. Counsel stated she had "no doubt that [Ban] has [post-traumatic stress disorder]" from this awful experience, although Ban had never been diagnosed with the disorder and had never sought counseling.

Defense counsel disputed the probation officer's conclusion the crimes involved separate acts of violence. Counsel argued the crimes instead involved only a single act of violence because the separate offenses were not predominantly independent of each other and occurred at the same place and time. Counsel asked the court to impose two of the terms concurrently, for a total of 30 years to life.

In sentencing Ban, the trial court, having read and considered the probation officer's report, said: "[T]he jury here has determined, quite simply, that you are a murderer." The court told Ban: "It's no different than if you would have picked up a gun and walked up to that car and shot.... And I have to know today that when you got behind the wheel of that car it was more than just you might have been a danger. But I

³ All references to rules are to the California Rules of Court.

can't come to any other conclusion except that you knew you were going to kill people and you didn't care." The court also noted that four "absolutely innocent" people were killed and that Ban had numerous prior convictions for driving under the influence. The court further found Ban's "horrific upbringing in those [labor] camps" was "countervail[ed]" by the fact that he "[knew] how dangerous it was to drink and drive—and we're not talking about somebody who just continued to drink, but he drove time and time again. And in driving time and time again he then became a murderer."

The court also noted rule 4.425 allows a court to "consider any factors in aggravation in deciding whether or not to impose a consecutive versus a concurrent sentence," and stated the factors in aggravation in this case "include[d] that the crime involved great violence, great bodily harm and was vicious." The court then sentenced Ban to the maximum sentence of 60 years to life in prison.

On January 17, 2017, Ban timely filed a notice of appeal.

DISCUSSION

Ban argues the trial court's reasons for imposing the maximum sentence were either unsupported by the evidence or were legally improper. Specifically, he contends (1) there was no evidence his crimes "involved great violence, great bodily harm and [were] vicious;" (2) the court erroneously concluded he "knew" he was going to kill people; (3) the court impermissibly relied on the innocence of the victims; and (4) the court used the crime of murder itself as an aggravating factor. We conclude that, even assuming these contentions are meritorious, the imposition of consecutive sentences was nevertheless justified by other factors properly relied on by the court, including that Ban had suffered multiple prior convictions for driving under the influence and that several people were killed in the crash.

Forfeiture and Ineffective Assistance of Counsel

A defendant's failure to object to the trial court's sentencing determinations when given a "meaningful opportunity" to do so forfeits the claim on appeal. (*People v. Scott* (1994) 9 Cal.4th 331, 355–356 (*Scott*); see *People v. de Soto* (1997) 54 Cal.App.4th 1, 7–8 [failure to impose a specific objection at sentencing forfeits claim on appeal].)

Acknowledging his failure to object below, Ban asserts the issue was not forfeited on appeal, but should we find otherwise, any failure to object was the result of ineffective assistance of counsel. We conclude defendant forfeited his claim.

To establish ineffective assistance of counsel based on counsel's failure to object, Ban must show (1) counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and (2) counsel's deficient performance was prejudicial. (*Strickland v. Washington* (1984) 466 U.S. 668, 687–688 (*Strickland*); *People v. Ledesma* (1987) 43 Cal.3d 171, 216–217 (*Ledesma*)). To establish prejudice, Ban must make a showing “sufficient to undermine confidence in the outcome” that but for counsel's deficient performance there was a “reasonable probability” “the result of the proceeding would have been different.” (*Strickland*, at p. 694; *Ledesma*, at pp. 217–218.) On review, we can adjudicate an ineffective assistance claim solely on the issue of prejudice without determining the reasonableness of counsel's performance. (*Strickland*, at p. 697; *People v. Hester* (2000) 22 Cal.4th 290, 296–297.) We will do so here because, as we will explain, the sentence rendered in this case was fully justified by other factors and there is no reasonable probability Ban would have received a lesser sentence had counsel objected.

Standard of Review for Sentencing Choice

“[A] trial court has discretion to determine whether several sentences are to run concurrently or consecutively.” (*People v. Bradford* (1976) 17 Cal.3d 8, 20.) There is no presumption in favor of concurrent sentencing. (*People v. Black* (2007) 41 Cal.4th 799, 822.) “If [the court] has faithfully applied the sentencing rules, the only other question is whether, all circumstances considered, the trial court's discretion exceeds the bounds of reason.” (*People v. Reeder* (1984) 152 Cal.App.3d 900, 923.) If sentencing error occurs, remand for resentencing is not required if “ ‘it is not reasonably probable that a more favorable sentence would have been imposed in the absence of the error.’ ” (*Scott, supra*, 9 Cal.4th at p. 355.)

Analysis

A trial court must “state the reasons for its sentence choice[s] on the record at the time of sentencing.” (§ 1170, subd. (c).) Where the court has discretion, the imposition of consecutive, rather than concurrent, terms represents a sentencing choice.

(Rule 4.406.) Rule 4.425(a) sets forth factors the court may use in deciding whether to impose consecutive rather than concurrent terms. These factors include whether “(1) The crimes and their objectives were predominantly independent of each other; (2) The crimes involved separate acts of violence or threats of violence; and (3) The crimes were committed at different times or separate places, rather than being committed so closely in time and place as to indicate a single period of aberrant behavior.” (Rule 4.425(a).)

Furthermore, rule 4.425(b) provides, in part: “Any circumstances in aggravation or mitigation may be considered in deciding whether to impose consecutive rather than concurrent sentences,” but “[a] fact that is an element of the crime may not be used as an aggravating factor.” (See rules 4.421 and 4.423 [listing circumstances in aggravation or mitigation, respectively].) One aggravating factor the court may consider is that “[t]he defendant’s prior convictions as an adult ... are numerous or of increasing seriousness.” (Rule 4.421(b)(2).)

In addition to the factors set forth in the Rules of Court, “a trial court has discretion to impose consecutive sentences where ... a single act has resulted in crimes against multiple victims.” (*People v. Leon* (2010) 181 Cal.App.4th 452, 468.) Our Supreme Court has explained the principle:

“ ‘A defendant who commits an act of violence with the intent to harm more than one person or by a means likely to cause harm to several persons is more culpable than a defendant who harms only one person. For example, a defendant who chooses a means of murder that places a planeload of passengers in danger, or results in injury to many persons, is properly subject to greater punishment than a defendant who chooses a means that harms only a single person.’ ” (*People v. Oates* (2004) 32 Cal.4th 1048, 1063.)

In *People v. Calhoun* (2007) 40 Cal.4th 398, the defendant was convicted of two counts of vehicular manslaughter for killing two people while drag racing and was

sentenced to the upper term on one of these convictions. On appeal, the defendant claimed the trial court improperly relied on the fact there were multiple victims in imposing the upper term. The California Supreme Court disagreed, explaining that “[t]here is no persuasive reason why the trial court should not be allowed to consider the fact of multiple victims as a basis for imposing either the upper term or a consecutive sentence” (*Id.* at p. 408.)

The record in this case shows the trial court relied on two valid factors in imposing consecutive sentences. The court discussed Ban’s multiple prior convictions for driving under the influence, as well as the fact several people were killed in the crash. Each of these factors alone justified consecutive sentencing, and we therefore cannot say the sentence exceeded the bounds of reason. Additionally, while not discussed at the hearing, the court could have noted the increasing seriousness of Ban’s crimes: his stipulated blood alcohol concentration was 0.19 percent in his first offense and 0.35 percent in his second offense, and in his third offense he killed four people. If this case were remanded for resentencing, the increasing seriousness factor would only serve to further justify consecutive sentencing.

Assuming for the sake of argument the trial court erred by relying on some improper factors, remand is unnecessary because, as we have explained, the court articulated other valid factors to justify the sentence. Thus, “[i]t is not reasonably probable that a more favorable sentence would have been imposed in the absence of the error.” (*Scott, supra*, 9 Cal.4th at p. 355.) For the same reasons, Ban’s ineffective assistance of counsel claim fails as he has not suffered prejudice.

DISPOSITION

The judgment is affirmed.